United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4076

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4076

REINHARD WILHELM LINDNER,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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UNITED STATES COURT OF APPEALS
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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Reinhard Wilhelm Lindner ("Lindner") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on January 31, 1975. That order dismissed an appeal from a decision of an Immigration Judge finding Lindner deportable pursuant to Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), by virtue of his conviction on April 29, 1971, upon a plea of guilty, for illegal possession of marijuana pursuant to Sections 19-452 and 19-481(b) of the Connecticut General Statutes, revised 1958.

This petition for review was filed on April 24, 1975 and pursuant to Section 106(a)(3) of the Act, 8 U.S.C.

§ 1105(a)(3) Lindner's deportation was automatically stayed.

Statement of the Issue

Whether an erasure of the petitioner's arrest and Court records pursuant to Connecticut General Statutes § 54-90 precludes a finding that Lindner is deportable as an alien convicted of a crime relating to narcotics under Section 241(a)(11) of the Act, 8 U.S.C. § 1251 (a)(11).

Statement of the Facts

Reinhard Wilhelm Lindner is a 27 year old alien, a native and citizen of Germany, who was admitted to the United States for permanent residence on February 20, 1957.

On January 8, 1971 Lindner was arrested and charged with the illegal possession of marihuana with intent to sell and illegal possession of marihuana, both in violation of Connecticut General Statutes Section 19-452, punishable under Connecticut General Statutes, Sections 19-480(a) and 19-481(b) respectively (T. 18).* On April 29, 1971 Lindner was convicted upon a plea of guilty to illegal possession of marihuana and was sentenced by the Connecticut Superior Court to one year's confinement in the Community Correctional Center at Montville, Connecticut, to be suspended after six months. The charge of illegal possession with intent to sell was nolled by the State's Attorney on the same date (T. 18).

On August 16, 1971 the Immigration and Naturalization Service (the "Service") commenced deportation pro-

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* References preceded by "T" are to the certified administrative record which has been filed with the Court.

ceedings with the issuance of an order to show cause and notice of hearing (T. 15). The order to show cause charged that Lindner was deportable under Section 241 (a)(11) of the Act, 8 U.S.C. § 1251(a)(11) by virtue of his conviction under Sections 19-452 and 19-481(b) of the Connecticut General Statutes.

At the deportation hearing on November 15, 1971 before an Immigration Judge, at which time Lindner was represented by counsel, the petitioner admitted the truth of the factual allegations contained in the Order to Show Cause (T. 17). The Service introduced into evidence the record of Lindner's conviction which Lindner conceded related to him (T. 17).

At the conclusion of the hearing the Immigration Judge entered a decision finding that Lindner is deportable by virtue of his conviction and that there is no form of relief from deportation available to Lindner under the existing immigration laws notwithstanding the equities that existed in the matter. Accordingly, he ordered that Lindner be deported.

On November 29, 1971 Lindner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 16). On May 7, 1973, petitioner was granted an absolute pardon from the Connecticut Pardons Board, a copy of which was subsequently furnished to the Service (T. 10). On January 31, 1975, after consideration of the administrative record and oral argument which had been held on May 17, 1973 (T. 3), the Board rendered a decision and entered an order dismissing the appeal (T. 2). The Board rejected Lindner's contention that his pardon by the State of Connecticut and a subsequent erasure of his criminal records under Section 54-90 of the Connecticut General Statutes removed the basis for his deportation under Section 241(a)(11) of the Act. In reaching that conclusion the Board relied on the plain language of

Section 241(b) of the Act, 8 U.S.C. §1251(b), which states that the provisions of the Act which remove the basis of deportability of an alien who is granted a full and unconditional pardon shall not apply to an alien, such as Lindner, who was charged as being deportable under Section 241(a)(11) of the Act. The Board further stated that the subsequent erasure of Lindner's arrest and court records is distinguishable from expungement under Federal or state "Youth Corrections" statutes. Since Lindner was not treated as a youthful offender by the State of Connecticut and since erasure of his records does not negate his conviction for the purpose of deportation pursuant to Section 241(a)(11) the Board dismissed the appeal.

Relevant Statutes

Immigration and Nationality Act, 66 Stat. 163 (1952) as amended:

Section 241, 8 U.S.C. §1251

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compound-

ing, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

* * * * *

(b) The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section."

CONNECTICUT GENERAL STATUTES, REVISED 1958

§ 54-90. Erasure of arrest and court records after not guilty findings, dismissals, nolles, continuances and pardons

(a) Whenever in any criminal case the accused, by a final judgment, is found not guilty of the charge or the

charge is dismissed, all police and court records and records of the state's or prosecuting attorney pertaining to such charge shall be immediately and automatically erased.

(b) Whenever in any criminal case prior to October 1, 1969, the accused, by a final judgment, was found not guilty of the charge or the charge was dismissed, the arrested person or any one of his heirs may file a petition for erasure with the court granting such not guilty judgment or dismissal, or, where the matter had been before a municipal court, a trial justice or the circuit court, with the court of common pleas and thereupon all police and court records and records of the state's attorney, prosecuting attorney or prosecuting grand juror pertaining to such charge shall be immediately and automatically erased.

(c) Whenever any charge in a criminal case has been nolled in the superior court or in the circuit court, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased, provided in cases of nolles entered in the superior court, court of common pleas, circuit court, municipal court or by a justice of the peace prior to April 1, 1972, such records shall be deemed erased by operation of law and the clerk or chief clerk or any person charged with the retention and control of such records shall not disclose to anyone their existence or any information pertaining to any charge so erased; provided nothing in this section shall prohibit the arrested person or any one of his heirs from filing a petition to the appropriate court to have such records physically erased, in which case such records shall be erased. Whenever any charge in a criminal case has been continued in the superior court, or the circuit court or court of common pleas, and a period

of thirteen months has elapsed since the granting of such continuance during which period there has been no prosecution or other disposition of the matter, the charge shall be construed to have been nolled as of the date of termination of such thirteen-month period and such erasure may thereafter be affected or a petition filed therefor, as the case may be, as provided in this subsection for nolled cases.

(d) Whenever prior to the effective date of this act, any person who has been convicted of an offense in any court of this state has received an absolute pardon for such offense, such person or any of his heirs may, at any time subsequent to such pardon, file a petition, with the court in which such conviction was effected, or with the court having custody of the records of such conviction, for an order of erasure in the same manner as is provided in subsection (c) of this section, and such court shall order all police and court records and records of the state's or prosecuting attorney pertaining to such case to be erased. Whenever such absolute pardon was received on or after the effective date of this act, such records shall be automatically erased.

(e) The clerk of the court or chief clerk of the court of common pleas, as the case may be, shall not disclose to anyone information pertaining to any charge erased under any provision of this section and shall forward a notice of such erasure to any person, body or agency, including but not limited to, the state department of police, within or without the state, to whom any information concerning the arrest of the accused has been disseminated. In the case of any person, body or agency within the state, such disseminated information and all copies and duplicates thereof shall be forwarded to the clerk of the court or chief clerk, as the case may be, and shall be erased from the records of such person, body or agency.

Such clerk or chief clerk, as the case may be, shall seal such records and place them in locked files maintained for this purpose; or upon the request of the accused cause the actual physical destruction of such records. No fee shall be charged in any court with respect to any petition under this section. Any person who shall have been the subject of such an erasure shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.

(d) Upon motion properly brought, the court or a judge thereof, if such court is not in session, may order disclosure of such records to the accused if the court or judge thereof, as the case may be, finds that nondisclosure may be harmful to the accused in a civil action or may order disclosure to a defendant or the accused in an action for false arrest arising out of the proceedings so erased.

(f) Upon motion properly brought, the court or a judge thereof, if such court is not in session, may order disclosure of such records to the accused if the court or judge thereof, as the case may be, finds that non-disclosure may be harmful to the accused in a civil action or may order disclosure to a defendant or the accused in an action for false arrest arising out of the proceedings so erased.*

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* 1974, P.A. 74-52, § 1, rewrote the first sentence of subsec. (c) by deleting "court of common pleas" following "nolled in the superior court", by deleting "or in a municipal court or by a justice of the peace," following "or in the circuit court," and by adding the proviso at the end reading "provided in cases of nolles * * * such records shall be erased."; and amended the second sentence of subsec. (c) by substituting "thirteen months" following "and as period of" and "termination of such", by inserting "such" following "period and", and by inserting "or a petition filed therefor, as the case may be" following "erasure may thereafter be effected".

[Footnote continued on following page]

ARGUMENT

The petitioner's conviction pursuant to Sections 19-452 and 19-481(b) of the Connecticut General Statutes renders him deportable under Section 241 (a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11) regardless of a subsequent pardon or erasure of his arrest and court records.

A. Construction of the Federal Immigration Statute

The stringent Congressional policy regarding deportation of drug offenders was recently discussed by this Court in *Bronsztejn* v. *Immigration and Naturalization Service*, — F.2d —, Docket No. 75-4060 (2d Cir., December 2, 1975) wherein it stated:

> "Although originally directed primarily at narcotics 'traffickers,' the legislative history of the INA leaves no doubt that Congress intended a stringent deportation policy regarding drug offenders. The

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1974, P.A. 74-163, § 1, amended subsec. (d) by inserting in the first sentence "prior to effective date of this act" following "Whenever", and added the second sentence.

1974, P.A. 74-163, § 2, amnded subsec. (e) by adding to the first sentence, "and shall forward a notice * * * physical destruction of such records.", and by rewriting the third sentence by substituting "Any" for "No", by inserting "never" following "deemed to have" by deleting "ab initio" following "been arrested", and by adding "and may so swear under oath." at the end.

1974, P.A. 163, § 3, added subsec. (f).

1974, P.A. 74-183, §152, substituted, in subsec. (b) and (e), "court of common pleas" for "circuit court"; inserted in subsec. (b), "or the circuit court" following "a trial justice"; inserted, in subsec. (c), "or court of common pleas" following "or the circuit court"; and amended subsec. (d) by inserting "or with the court having custody of the records of such conviction" following "such conviction was effected," and by substituting subsection "(b)" for "(c)".

> 1952 version of the Act required deportation of addicts even though they had committed no crime and were later rehabilitated. The 1956 amendments added 'possession' as a deportable offense. Finally, in 1960 Congress specifically made the Act applicable to marijuana and its possession or distribution. We must reject any suggestion that the Act applies solely to traffickers (footnotes omitted)."

Neither the magnitude of the drug offense nor equities relating to the alien save him from deportation. See *Van Dijk* v. *Immigration and Naturalization Service*, 440 F.2d 798 (9th Cir. 1971).

In order to support the deportation charge under Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), it was incumbent upon the Government to establish that Lindner was "convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marihuana. . . ." In the deportation hearing the Government proved the conviction by submitting into evidence the certified record of conviction for illegal possession of marihuana. Lindner, when pleading to the order to show cause, admitted the conviction. Lindner was, therefore, properly found deportable under Section 241(a)(11) of the Act.

B. Lindner's subsequent pardon by the State of Connecticut and any erasure of his arrest record does not bar his deportation under the Immigration and Nationality Act.

Subsequent to his conviction under Connecticut General Statutes §§ 19-452 and 19-481(b) for illegal possession of marihuana petitioner was granted an absolute and unconditional pardon by the State of Connecticut. He

states that this pardon relating to his conviction of illegal possession of marihuana enabled him to petition for the erasure of his arrest and court records pursuant to Connecticut General Statute § 54-90. He submits that the effect of this erasure is to remove the grounds of his deportability and thereby nullify his order of deportation. His position is contrary to federal law.

As discussed in the Board's decision of January 31, 1975, under Section 241(b) of the Act, 8 U.S.C. § 1251(b) a full pardon for his marihuana offense would not relieve him from deportation pursuant to Section 241(a)(11). Section 241(b) specifically and unequivocally states that the ameliorative provisions of that subsection "shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section." See *Oliver* v. *United States Department of Justice, Immigration and Naturalization Service*, 517 F.2d 426 (2d Cir. 1975). Therefore Lindner's pardon by the State of Connecticut clearly fails to relieve him from deportation.

Nor does the erasure of his arrest record pursuant to Connecticut General Statutes § 54-90 affect his deportability. Under the Immigration and Nationality Act, expunction of a narcotics conviction does not affect the validity or finality of that conviction for immigration purposes. The only exception to this general rule is the expunction of a narcotics conviction under the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq., and similar state statutes for youthful offenders.

In *Garcia-Gonzalez* v. *I.N.S.*, 344 F.2d 804 (9th Cir. 1965), *cert. denied*, 382 U.S. 840, the Ninth Circuit faced squarely the issue whether the setting aside of a plea of guilty, entry of a plea of not guilty, and dismissal of the information pursuant to California law,

"wiped out" or "expunged" the conviction upon which the deportation order rests to the extent that the order must be re-considered. It held that the state procedure did not have such an effect. The Ninth Circuit has consistently followed the principle laid down in *Garcia-Gonzalez, supra*. *E.g.*, *Chabolla-Delgado* v. *I.N.S.*, 384 F.2d 360 (9th Cir. 1967), *cert. denied*, 393 U.S. 865; *Brownrigg* v. *I.N.S.*, 356 F.2d 377 (9th Cir., 1966); *Kelly* v. *I.N.S.*, 349 F.2d 473 (9th Cir. 1965), *cert. denied*, 382 U.S. 932; *Ramirez-Villa* v. *I.N.S.*, 347 F.2d 985 (9th Cir. 1965), *cert. denied*, 382 U.S. 908. It has also held that a narcotics conviction expunged under Section 176.225, Nevada Revised Statutes, which is similar to the California statute, remains a conviction for deportation purposes. *Tsimbidy-Rochu* v. *I.N.S.*, 414 F.2d 797 (9th Cir. 1969).

Moreover, the Fifth Circuit has followed the Ninth Circuit's reasoning in construing Section 7 of the Texas Adult Probation and Parole Law, which contains provisions similar to those in the California and Nevada statutes. The Court, referring to the Texas statute, said:

> "Rather than a statute that completely erases the conviction, we believe the provision in controversy is accurately characterized as one that rewards a convicted party for good behavior during probation by releasing him from certain penalties and disabilities otherwise imposed upon convicted persons by Texas law. Secondly, we believe that the sanctions of 8 U.S.C. § 1251(a)(11) are triggered by the fact of the state conviction. The manner in which Texas chooses to deal with a party subsequent to his conviction is simply not of controlling importance insofar as a deportation proceeding—a function of federal, not state, law —is concerned. We agree with the Ninth Circuit

> that [*i*]*t would defeat the purposes* * * * * [*of federal law*] *if provisions of local law, dealing with rehabilitation of convicted persons, could remove them from their ambit of* [*federal penal enactments*] * * * *We do not think Congress intended such a result.*" *Gonzalez de Lara* v. *United States*, 439 F.2d 1316, 1318-19 (5th Cir. 1971). (Emphasis added.)

Until recently, narcotics convictions have also been held to be final for deportation purposes when the offenses are committed by persons who are treated under state law as youthful offenders. In an unreported decision the Board of Immigration Appeals affirmed the deportation order against an alien who at age nineteen had been convicted in California of unlawful possession of heroin and marihuana and had been placed in the custody of the Youth Authority. The Board held that he was deportable on the basis of the conviction notwithstanding a judicial order of discharge under Section 1772 of the California Welfare and Institutions Code, which is similar to the procedure under Section 1203.4 of the California Penal Code. The Ninth Circuit affirmed the Board's decision. *De la Cruz-Martinez* v. *I.N.S.*, 404 F.2d 1198 (9th Cir.), *cert. denied*, 394 U.S. 955 (1968).

However, considering the effect of the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. on a narcotics conviction in *Mestre-Morera* v. *I.N.S.*, 462 F.2d 1030 (1st Cir. 1972), the First Circuit held that 18 U.S.C. § 5021, pursuant to which the conviction had been expunged, "clearly contemplates more than a technical erasure; it expresses a Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions." *Mestre-*

Morera, supra, at 1032.* The First Circuit distinguished its case involving the Federal Youth Corrections Act, which it held could have an effect on deportation, from the Ninth Circuit's cases involving expnction of state convictions under an unusual *state* procedure; the state procedure, of course, did not reflect Congressional intent and therefore could have no effect on deportation.

Regardless of the possible Congressional intent underlying the Federal Youth Corrections Act as interpreted in *Mestra-Morera, supra,* Congress has certainly not seen fit to afford a benefit to those receiving pardons or expungements. Indeed, § 241(b) of the Act excludes such a benefit to those receiving pardons. The Connecticut procedures for pardon and erasure** cannot therefore

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* On the basis of *Mestre-Morera, supra,* the *Service* has reversed its former position, as reflected in *De la Cruz-Martinez, supra,* and has extended the First Circuit's ruling on the federal statute to similar state procedures for youthful offenders. See *Matter of Andrade,* Interim Decision No. 226, decided by the Board on April 5, 1974. The Board's prior decision in the *Andrade* case, Interim Decision 2205, decided May 31, 1973, followed the Ninth Circuit's rule enunciated in *De la Cruz-Martinez, supra.* The Board's order was affirmed by the Ninth Circuit in an order entered August 15, 1973. Andrade then petitioned the Supreme Court for certiorari. As a result of the Board's order of April 5, 1974 the Supreme Court granted the petition, vacated the Ninth Circuit's judgment and remanded the case with directions to dismiss it as moot. 416 U.S. 765 (1974).

** Even if the Congressional intent were not so clear, under *Mestre-Morera, supra,* the fact that the Connecticut statute provides only a "technical erasure" would militate against a vitation of the Board's decision here. As the title of that Connecticut statute indicates, Lindner merely received an erasure of his marihuana conviction. That statute does not completely "wipe out" or "expunge" the conviction but rather is merely a "technical erasure" designed to relieve a person from the adverse effects which may flow from a conviction or an arrest which is dismissed or nolled.

[Footnote continued on following page]

be given any weight or benefit to those seeking to avoid deportation under the strict requirements and limitations of Section 241 cited above. *Gonzalez de Lara, supra*; *Garcia-Gonzalez, supra*; see *Oliver, supra.****

The statute specifically relates to the sealing of arrest and court records. Even more directly in point, subsection (f) of that erasure statute permits the subsequent disclosures of thes records upon motion to the state court. Certainly the technical erasure of Lindner's arrest and conviction and the sealing of his records under Section 54-90 has no greater effect than the underlying act of the Connecticut Pardons Board in granting him a pardon.

*** The Congressional enactment of 18 U.S.C. § 5005 et seq., which treats youthful offenders differently from other criminal offenders, is certainly a rational and constitutionally permissible classification. Contrary to the petitioner's argument, if Congress desires to treat offenders differently when imposing criminal sanctions, then it may enact immigration statutes and the Service may adopt policies which classify and mandate varying treatment with respect to the deportation of persons convicted of narcotics offenses versus those narcotics offffenders who have received youthful offender treatment. Further, the courts have consistently rejected constitutional attacks relating to classifications involving the expulsion or exclusion of aliens. See *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir. 1975), *cert. denied*, — U.S. — (October 6, 1975); *Faustino* v. *INS*, 302 F. Supp. 212 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921; *Fiallo* v. *Levi, et al.*, 74 C. 1083 (E.D.N.Y. November 28, 1975) (three judge court); *Dunn* v. *INS*, 499 F.2d 856 (9th Cir. 1974), *cert. denied*, — U.S. — (1975); *Perdido* v. *INS*, 420 F.2d 1179 (5th Cir. 1969); see also, *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
December, 1975

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING CA 75-4076

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 16th day of December 1975 she served a copy of the within respondents brief

by placing the same in a properly postpaid franked envelope addressed:

~~XX~~ J. Ward Rafferty, Esq.,
231 Captains Walk,
New London, Conn. 06320

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Annex, ~~Foley Square~~ Borough of Manhattan, City of New York.
One St. Andrews Plaza,

Pauline P. Troia

Sworn to before me this

16th day of December 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977